IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 86

JAMES EDWARDS, JR., ET AL., PETITIONERS,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR RESPONDENT

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

Whether the convictions of petitioners in the State court for the crime of breach of the peace are invalid because petitioners were denied due process of law or their rights to freedom of speech and peaceful assembly were violated.

STATEMENT

On March 2, 1961, a group of Negro students, petitioners herein, numbering approximately two hundred, met in a church in the City of Columbia with several older leaders for the purpose of organizing and carrying out a demonstration on the grounds of the South Carolina State House located within the City. They knew the General Assembly of the State was in session, and the avowed purpose of the demonstration was to protest to the General Assembly against all laws of the State relating to segregation of the races (R. 34, 109, 163).

The students, with their leaders, marched through the city streets in groups of twelve to fifteen, arriving at the State House grounds shortly before noon. The City Manager of Columbia, with City and State police officers, was already on the scene (R. 68). The students were told that they could walk in and about the grounds so long as they were peaceful (R. 35). At this time there were only a few persons present besides the students and police officers (R. 36). The students then proceeded to put into effect their planned course of action, marching in groups in and about the grounds, displaying placards, such as "I am proud to be a Negro", "Down with segregation", "You may jail our bodies but not our souls", and one placard which referred to "going to jail for freedom" (R. 110, 114, 150). Some of the groups proceeded in single file and some two abreast in and about the relatively narrow walkways of the grounds (R. 101). They were not hindered by police officers or anyone else until a radical change in the overall situation took place (R. 35, 36).

After a period of time estimated at approximately forty-five minutes, it became evident to police authorities that a large crowd of onlookers, estimated at 300-350 persons, attracted by the students' activities, had almost filled

the "horseshoe" area of the grounds, blocking vehicular traffic lanes, impeding the flow of pedestrian traffic on adjacent sidewalks, and adversely affecting vehicular and pedestrian traffic on the adjoining city streets (R. 9, 10, 11, 36). By that time, also, it had become evident to police authorities that there was imminent danger of further disruption of the public peace. Known "troublemakers" were recognized in the crowd of onlookers (R. 28, 29, 140). The total number of persons in and about the "horseshoe" area was increasing steadily, and the resulting situation relating to the free flow of traffic was growing worse (R. 70, 71).

It was at this point, and not until then, that police authorities instructed the students to desist and disperse (R. 13, 133). Such instructions were given to all the students. They refused to obey the order. Instead, in response to what the City Manager described as a "harangue" by their recognized leader, the students began to stamp their feet, clap their hands, and sing. Their marching continued (R. 133, 134). After approximately fifteen minutes of such activity, the students were arrested and charged with breach of the peace (R. 36, 134). It appears that the students were orderly until they were ordered to disperse, but that they were disorderly from that time until they were placed under arrest.

ARGUMENT

Petitioners' Convictions in the State Trial Court of the Common Law Crime of Breach of the Peace were Based on Sufficient Evidence to Establish Their Guilt, and, Therefore, No Denial of a Constitutional Right was Involved.

Evidence before the State trial court was sufficient to sustain convictions of the petitioners for the common law crime of breach of the peace. It follows that no denial of a constitutional right was committed. There is no such right to commit a crime. There was ample testimony from police

authorities of serious blockage of and hindrance to vehicular and pedestrian traffic throughout the area caused by persons attracted to the scene by petitioners. Among those persons were some recognized by experienced police authorities to be "troublemakers". There was considerable racial tension in the City at this time (R. 143).

This totality of circumstances convinced police authorities that some official action must be taken to restore public peace and tranquility, which had been disturbed already, and to prevent more serious trouble (R. 143, 144). The situation with which the police were confronted here was more serious than that which was involved in *Feiner v. New York*, 340 U. S. 315. In Feiner, there were only seventy-five to eighty persons involved, with relatively minor disruption of pedestrian traffic, it being stated that "some pedestrians were forced to walk in the street to avoid the crowd" (p. 317). By way of contrast, the present case involved an increasing crowd of onlookers estimated as great as 350 persons plus two hundred demonstrating students, making a total of perhaps five hundred fifty persons (R. 9, 11). Certainly blockage of pedestrian traffic was more extensive than in *Feiner*, plus the hindrance to and blockage of vehicular traffic (R. 11, 36), which was not present at all in that case.

It is true that one individual in *Feiner* threatened to assault the speaker (p. 317) and that there was testimony of some pushing, shoving, and milling around (p. 317), and testimony that the speaker had passed "the bounds of argument or persuasion and had undertaken incitement to riot" (p. 321). There is no such testimony in the present case; but those additional elements seem insufficient to distinguish this from *Feiner*. One individual, known to police, threatening assault on the speaker could have been controlled easily. Milling about, pushing, and shoving in a

close street crowd is normal. The words of the speaker undertaking "incitement to riot" seem less an actual or threatened breach of the public peace than the boisterous stamping of feet, shouting, and loud singing of the petitioners there when they were instructed to disperse (R. 133, 134).

There is no scintilla of evidence in the record of this case to indicate that the police officers involved acted for the purpose of suppressing the views expressed by the petitioners, or that they acted for any other reason than to preserve the public peace.

Although the petitioners put up very little testimony in the trial court, the testimony of two of them strongly indicates that they had little or no regard for their duty as citizens to assist in the maintenance of the public peace. As to the numbers of demonstrators used in the relatively restricted area available in and about the State House grounds, Reverend B. J. Glover, a defendant, testified (R. 168, 169):

> Counsel: Do you think that right (to demonstrate) extends to a large group of two hundred people?
>
> Rev. Glover: Yes, as individuals, and I believe that the group at least I acted as an individual because I chose to follow them.
>
> Counsel: You were acting in concert, were you not?
>
> Rev. Glover: Yes.
>
> Counsel: If its all right for a group of two hundred, would it be all right for a group of four hundred?
>
> Rev. Glover: It would be all right, if they acted under the same circumstances under which we acted.
>
> Counsel: Would it be all right for a group of ten thousand?
>
> Rev. Glover: I haven't ever assembled a group of ten thousand.

The only other defendant placed on the stand, James Jerome Kirton, indicated a total disregard for any reasonable control of mass demonstrations by testifying (R. 118):

> Counsel: Don't you think, if the only purpose of your demonstration that day was to call attention to the various members of the Legislature and any other officials who may have been in or about the State House, that two hundred, or approximately two hundred, Negro students marching in and about the grounds with placards would have had time in an hour to sufficiently demonstrate to any of them, by person, their views or whatever views they were expressing by demonstration or call attention to themselves?
>
> Kirton: Are you asking that we could easi... have expressed our view to one person instead of
>
> Counsel: No. I'm asking if you don't think an hour was long enough for that purpose.
>
> Kirton: I don't.
>
> Counsel: How long did you intend to demonstrate?
>
> Kirton: Until conscience told me that the demonstration had lasted long enough.

It is not intended by the emphasis placed on the testimony of Reverend Glover and Mr. Kirton to argue that a limit of time or numbers may be placed upon the right of freedom of speech and assembly. Their testimony does indicate, however, that the petitioners took no thought of the disruption of the normal use of the public sidewalks and streets in the area, and that it was not unreasonable for police authorities to act to relieve the situation created by such an extended demonstration by so large a group of persons.

It is argued by the petitioners that their loud singing, shouting, and stamping of feet did not occur until **after** they were ordered to disperse (p. 5). Orders by the police to cease their demonstration did not justify such activity. If they thought that the police had overstepped their au-

thority, they could have refused to comply in an orderly and peaceful manner. An order by constituted authority, if unlawful, may be refused, but the fact that the order is unlawful does not justify a public disturbance by the one who receives the order. They were not resisting an unlawful arrest because no attempt at arrest had been made at this time. Their boisterous conduct at this time only added to the breach of public peace which had occurred already.

Petitioners place much emphasis upon the fact that they did not commit any act specifically prohibited by law and that there were no threats or acts of violence by any of the onlookers (p. 15). The problem faced by the police authorities in this case is succinctly stated in a concurring opinion in *Niemotko v. Maryland*, 340 U. S. 268, at p. 275:

> "Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing. It is important to bear in mind that this Court can only hope to set limits and point the way. It falls to the lot of legislative bodies and administrative officials to find practical solutions within the framework of our decisions."

Speaking of such framework, the opinion states at p. 282:

> "What is the interest deemed to require the regulation of speech? The State cannot, of course, forbid public proselyting or religious argument merely because public officials disapprove the speaker's views. It must act in patent good faith to maintain the public peace, to assure the availability of the streets for their primary purposes of passenger and vehicular traffic and for equally indispensible ends of modern community life."

The Court said in *Feiner* (p. 320):

> "This Court respects, as it must, the interest of the community in maintaining peace and order on its streets."

The following short quotations from the testimony serve to show the traffic situation as it appeared to police officers before they gave the order to disperse. City Manager McNayr testified (R. 10, 11):

Counsel: Can you estimate the number of persons who did gather in and around this horseshoe by the time that it became apparent to you that some further official action on your part would be necessary?

McNayr: I would estimate the number of persons, in addition to the student groups, to be in the neighborhood of 250 to 300 people.

Counsel: Now, with relation, Mr. McNayr, to the sidewalks around the horseshoe and the lane for vehicular traffic, how was the crowd distributed, with regard to those sidewalks and roadways?

McNayr: Well, the conditions varied from time to time, but at numerous times they were blocked almost completely with probably as many as thirty or forty persons, both on the sidewalks and in the street area.

Counsel: Would you say or state whether or not, in your opinion, this crowd did impede both vehicular and pedestrian traffic along the horseshoe?

McNayr: To the best of my kowledge, I can't recall a single vehicle trying to get in or out of the horseshoe. If one had attempted it, it would have impeded the entrance and exit to the horseshoe.

Counsel: Did you observe the pedestrian traffic on the walkway?

McNayr: Yes, I did.

Counsel: What was the condition there?

McNayr: The condition there was that it was extremely difficult for a pedestrian wanting to get through. Many of them took to the street area, even to get through the street area or the sidewalk.

City Manager McNayr testified further (R. 132):

Counsel: State whether or not you noticed or saw any change in the size of the number of persons who

might or might not have been within the horseshoe area?

McNayr: Yes. Soon after the Negro students arrived at the entrance to the horseshoe, crowds began to gather. This was in the neighborhood of twelve o'clock, noon, just prior to twelve o'clock, noon, and more and more people gathered within that area to the point where they were blocking both of the driveway entrances and the sidewalk area. They had to be told to move along, not to impede the sidewalk traffic, and it was necessary to station a policeman in the intersection of Gervais and Main Streets in order to keep traffic moving, because, again, a large group of persons attracted the passers-by in automobiles.

Counsel: Did you note the traffic, if any, which was on Gervais Street, immediately adjacent to the horseshoe?

McNayr: Yes, I did.

Counsel: Are you familiar with the normal flow of traffic on that street?

McNayr: Yes, I'm quite familiar with it.

Counsel: Was the traffic flow at that time normal?

McNayr: It was not normal—no, it was greatly slowed up. It had to be kept moving by a police officer. It was greatly slowed up, again, being attracted by the large group on the State House grounds. Normally, the lights control the traffic quite well.

Speaking of the activities of petitioners **after** they were told to disperse but **before** any attempt at arrest was made, McNayr testified (R. 133, 134):

Counsel: Did you hear any singing, chanting or anything of that nature from the student group?

McNayr: Yes.

Counsel: Describe that as best you can.

McNayr: With the harangues, which I have just described, witnessed frankly by everyone present and in this area, the students began answering back with shouts. They became boisterous. They stomped their feet. They sang in loud voices to the point where, again,

in my judgment, a dangerous situation was really building up.

Petitioners complain of the vagueness of common law breach of the peace, and point out the fact that the petitioners were not charged with violation of Section 1-417, 1952 Code of Laws of South Carolina (p. 19).* This statute involves only the use of driveways, alleys, or parking spaces on the State House grounds, and prohibits parking of vehicles by unauthorized personnel in certain parking areas on the grounds. There was no evidence that petitioners violated this Section. The defendant in *Feiner* was charged with disorderly conduct, which was nothing more than a statutory enactment of the common law crime of breach of the peace, *Niemotko v. Maryland*, 340 U. S. 268 (p. 287). It is pointed out in the concurring opinion of Justice Frankfurter in *Niemotko* (p. 289), that breach of peace statutes may be misused, but that the possibility of misuse alone is not enough to deny their practical existence.

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*§1-417 provides as follows:

"It shall be unlawful for any person:

(1) Except State officers and employees and persons having lawful business in the buildings, to use any of the driveways, alleys or parking spaces upon any of the property of the State, bounded by Assembly, Gervais, Bull and Pendleton Streets in *Columbia* upon any regular weekday, Saturdays and holidays excepted, between the hours of 8:30 a. m., and 5:30 p. m., whenever the buildings are open for business; or

(2) To park any vehicle except in spaces and manner marked and designated by the State Budget and Control Board, in cooperation with the Highway Department, or to block or impede traffic through the alleys and driveways."

In the present case, police authorities were stationed in and about the State House grounds before petitioners arrived (R. 18, 19), presumedly for the maintenance of the public peace. There is no evidence to the contrary. The petitioners were not hindered in any way in expressing their views in the manner in which they chose (R. 8, 9). Police authorities remained upon the scene observing the overall situation. It was not until it became apparent to them after approximately forty-five minutes of such activity by the petitioners that a dangerous situation was developing that they took any action relative to petitioners. There was serious blockage and hindrance to traffic and a large crowd containing unpredictable troublesome elements had gathered. In addition, after they were told to disperse, petitioners became extremely disorderly.

Such circumstances were of such nature as to create the clear and present danger of the substantive evils a state has a right to prevent, as that rule is set out by this Court in *Cantwell v. Connecticut*, 310 U. S. 296 (p. 308).

CONCLUSION

Wherefore, for the foregoing reasons, respondent prays that the judgment below be affirmed.

Respectfully submitted,

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